OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

March 3, 2003

Mr. Jesús Toscano, Jr.
Administrative Assistant City Attorney
Office of the City Attorney
City of Dallas
1500 Marilla Street, 7DN
Dallas, Texas 75201

OR2003-1336

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177252.

The City of Dallas (the "city") received a request for 1) the request for proposals ("RFP") which resulted in the Lawson payroll system contract, 2) all responses to the RFP which resulted in the Lawson payroll system contract, 3) the contract with Lawson and any contract additions following the signing of the original contract, and 4) information relating to a certain consultant's report. You state that you have released some of the requested information to the requestor.[1] However, you state that the release of the submitted information may implicate the proprietary rights of Interliant, Carrera/Maximus and SCA Technologies ("PeopleSoft"), Arthur Anderson, Midrange Software, marchFirst, Deloitte & Touche, and Ciber, Inc. ("Ciber"). Consequently, you notified these third parties of the request for information under section 552.305 of the Government Code. Although you do not take a position with regard to the disclosure of the requested information, PeopleSoft and Ciber have submitted briefing to this office in which they contend that information pertaining to them is excepted from disclosure under section 552.110 of the Government Code. We have considered all claimed exceptions and reviewed the submitted information.

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[1] As you have not submitted information responsive to the first and fourth categories of the request, we assume that this is the information that has been released. If it is not, you must release this information at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000).

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. With respect to the trade secret prong of section 552.110, we note that the Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).[2] This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). With respect to the commercial and financial information prong of section 552.110, we note that the exception

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[2]The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

> (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. Gov't Code § 552.110(b); *see* Open Records Decision No. 661 (1999).

Ciber states that its client names and client information, 4D Methodology, cost schedule and pricing information are excepted from disclosure as trade secrets under section 552.110(a). Upon review of Ciber's arguments and its information, we conclude that Ciber has established that its client information set forth in Appendix C of its proposal is excepted as a trade secret. *See* Open Records Decision Nos. 552 (1990); 437 (1986); 306 (1982); 255 (1980) (customer lists may be withheld under predecessor to section 552.110). Further, we have not received any arguments that rebut Ciber's claims as a matter of law. Thus, based on Ciber's arguments, we agree that the city must withhold Ciber's client names and client information under section 552.110(a). However, we do not believe that Ciber has demonstrated how its 4D Methodology, cost schedule, and pricing information are trade secrets. Accordingly, the city must withhold Ciber's client names and client information, but must release the remaining information pertaining to Ciber to the requestor. *See Hyde Corp.*, 314 S.W.2d at 776; Open Records Decision Nos. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 (1982) (finding information relating to pricing not excepted under section 552.110 and that pricing proposals are entitled to protection under section 552.104 only during bid submission process), 184 (1978); *cf.* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors).

PeopleSoft contends that the public release of "detailed information regarding PeopleSoft software functionality and technical architecture" is excepted from disclosure under section 552.110(b). Specifically, PeopleSoft argues that the public release of its information would allow its competitors to "structure their own responses to customer requirements based on the competitors' understanding of PeopleSoft software functionality." Based on PeopleSoft's arguments and our review of the submitted information, we conclude that PeopleSoft has established that a portion of the requested information constitutes commercial or financial information, the release of which would cause PeopleSoft substantial commercial harm. Therefore, the city must withhold from disclosure the information we have marked under section 552.110(b). We find, however, that PeopleSoft has not demonstrated that the remaining information is protected under section 552.110(b), and the city must release this information to the requestor. *See* ORDs 514, 319.

We note that although Interliant, Arthur Anderson, Midrange Software, marchFirst, and Deloitte & Touche were notified pursuant to section 552.305 of the Government Code, they have not provided this office with any arguments. Therefore, we have no basis to conclude that their information is excepted based on their proprietary interests. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result

from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, information pertaining to Interliant, Arthur Anderson, Midrange Software, marchFirst, and Deloitte & Touche must be released to the requestor, except as provided below.

Portions of the information to be released are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides that "[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act]." Therefore, unless the relevant individuals have affirmatively consented to the release of their e-mail addresses, the city must withhold the e-mail addresses in the submitted information, a representative sample of which we have marked under section 552.137.[3]

Finally, we note that some of the materials to be released are indicated to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, under section 552.110(a), the city must withhold from disclosure Ciber's client information set forth in Appendix C of its proposal. The city must withhold from disclosure PeopleSoft's information regarding "software functionality and technical architecture," which we have marked, under section 552.110(b). The city must withhold e-mail addresses of members of the public under section 552.137. The remaining submitted information must be released in accordance with federal copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

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[3]We note that section 552.137 does not apply to a government employee's work e-mail address, the general e-mail address of a business, nor to a web site or web page.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).
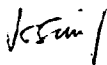
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 177252

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